



September 21, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.; Room TW-A325
Washington, DC 20554

Re: Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, CC Docket No. 98-141

Dear Ms. Salas:

Pursuant to the Memorandum Opinion and Order ("Merger Approval Order") in the above-referenced proceeding and the express conditions ("Merger Conditions") in Appendix C to that Order, the Commission staff has requested access to the audit workpapers and supporting materials for the Merger Compliance audit and the Advanced Services audit ("Agreed Upon Procedures" or "AUP"). Ernst & Young LLP (EY) will provide the Commission staff with access to these audit workpapers and supporting materials at their offices in Washington, D.C. In accordance with Paragraph 40(g) of the Merger Conditions, Section 220(f) of the Communications Act of 1934, as amended, and Section 0.459 of the Commission's rules, 47 C.F.R. 0.459, these audit workpapers and supporting materials are being made available to the Commission with the understanding that the Commission will keep them confidential, and the Commission will not make either the actual workpapers and supporting materials themselves, nor the contents thereof, available for public inspection. Also in accordance with paragraph 40(g) of the Merger Conditions: "Copying of the working papers and supporting material by the Commission shall be allowed but shall be limited to copies required for the Commission to verify compliance with and enforce these conditions."

Merger Conditions

In approving the merger between SBC and Ameritech, the Commission ruled that the "conditions [were] voluntarily submitted" by SBC and Ameritech and adopted them, with some modifications, as express conditions of its approval of the transfer of licenses and lines from Ameritech to SBC. Merger Approval Order, at paras. 353-4. See also para. 514.

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The SBC/Ameritech Merger Conditions require that SBC, at its own expense, annually engage an independent auditor to perform both of these audits regarding SBC/Ameritech's compliance with the SBC/Ameritech Merger Conditions, the Advanced Services separate affiliate requirement and the sufficiency of internal Company controls for ensuring compliance with those conditions. Merger Conditions at paras. 66 and 67. The audits have now been completed and the audit reports filed with the Commission on September 04, 2001.¹

The conditions further require that "(t)he Commission...shall have access to the working papers and supporting materials of the independent auditor at a location in Washington, D.C. that is selected by SBC/Ameritech and the independent auditor," and that the "Commission's review of the working papers and supporting materials shall be kept confidential pursuant to the Commission's rules and procedures." Merger Conditions, at para. 66(g).

Accordingly, in accepting the voluntary agreement of SBC Communications, Inc. (SBC) to conduct these audits and to provide access to the audit workpapers and supporting materials to the Commission as a condition of the merger, and in ruling that the Commission's review of those workpapers and materials will be "kept confidential," the Commission has already ruled that the audit workpapers and supporting materials will be withheld from public inspection.

Section 220 of the Communications Act

In addition to the Merger Approval Order and Merger Conditions, there is independent statutory authority for preserving the confidentiality of these audit workpapers and supporting materials.

Section 220(c) of the Communications Act of 1934, as amended, provided that "the Commission shall at all times have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, paper and correspondence now or hereafter existing, and kept or required to be kept by such carriers..." Further, Section 220(f) provides that "(n)o member, officer, or employee of the Commission shall divulge any fact or information which may come to this knowledge during the course of examination of books or other accounts, as provided herein, except insofar as he may be directed by the Commission or by the Court."

Thus, under the Communications Act itself, the Commission has a right of access to these workpapers and materials, provided that any facts or information contained therein is not independently divulged by any member, officer, or employee of the Commission.

¹ Letter from Sandra Wagner, SBC, to Magalie Salas, Secretary of the Commission, dated September 4, 2001.

Commission's Rules

The Commission's own rules prescribe the records that are not routinely made available for public inspection, and further provide that "any persons submitting information or materials to the Commission may submit therewith a request that such information not be made routinely available for public inspection." Sections 0.457 and 0.459(a), 47 C.F.R. 0.457 and 0.459(a). In addition, "if the materials are submitted voluntarily..., the person submitting them may request the Commission to return the materials without consideration if the request for confidentiality should be denied." Section 0.459(e), 47 C.F.R. 0.459(e).

The audit workpapers and supporting materials for both audits contain confidential, highly sensitive proprietary and privileged commercial information under 5 U.S.C. 552(b)(4) and Section 0.457(d) of the Commission's rules. Exemption 4 of the Freedom of Information Act shields information which is (1) commercial or financial in nature; (2) obtained from a person; and (3) privileged or confidential. See *Washington Post Co. v. U.S. Department of Health and Human Services*, 690 F.2d 252, 266-267 (D.C. Cir. 1982). The information in question clearly satisfies all three elements of the test. It contains commercially sensitive information including notes made by auditors when they interviewed SBC employees concerning the development and provision of collocations services, and various documents detailing the internal operation and business practices involved in this development and provisioning of such services.

With respect to the third element of the above test, information is considered to be "confidential" if disclosure "is likely to (1) impair the government's ability to obtain necessary information in the future,".... *National Parks and Conservation Ass'n. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) ("*National Parks I*"); *Washington Post Co. v. U.S. Department of Health and Human Services*, 690 F.2d 252, 268-269 (D.C. Cir. 1982). The Commission has specifically held that disclosure of data gathered by the Commission under its audit authority would be likely to impair the government's future ability to obtain such data, notwithstanding the statutory authority to compel production. See, *In the Matter of Martha H. Platt On Request for Inspection of Records*, FOIA Controls Nos. 90-63, *Memorandum Opinion and Order*, 5 FCC Rcd 5742, paras. 6 and 7 (1990).

Moreover, since the Commission has found that Ameritech and SBC voluntarily agreed to the conditions of the merger, including the audit condition, and has agreed to keep its review of the work papers and supporting documents confidential, disclosure of any of this information by the Commission would reasonably be expected to have a chilling effect on parties' willingness to agree to such conditions or to provide such information in the future.

In conclusion, in accordance with the Merger Conditions, the Communications Act, and the Commission's rules, the Commission is being provided access to the independent auditors' audit workpapers and supporting materials related to the Merger Compliance and the sufficiency of Company internal controls, as well as the Advanced Services audit. SBC understands that the Commission's review shall be kept confidential. The confidential working papers and supporting materials will be maintained and made available for access by the Commission at the following location:

Ernst & Young LLP
1225 Connecticut Avenue, N.W.
Washington, DC 20036

Pursuant to the Merger Conditions, SBC understands that copying shall be limited to those materials required by the Commission to verify compliance, and any copies shall be returned to SBC at the completion of the review.

If you have any questions, please do not hesitate to contact me at (202) 326-8919.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'm. thomas', with a stylized flourish at the end.

Michelle A. Thomas
Executive Director-Federal Regulatory (SBC)

Cc: Mr. Hugh Boyle, FCC
Mr. Anthony Dale, FCC
Mr. Mark Stephens, FCC
Mr. Brian Horst, Ernst & Young LLP